

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 105 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

GUJARAT HEAVY CHEMICALS LTD.

Versus

LA-V-JAY & ASSOCIATES ENGINEER& CONSULTANTS

Appearance:

Mr.J.M.Thakore, A.G. with
M/S TRIVEDI & GUPTA for Petitioner
Mr.N.D.Nanavaty, Sr.Advocate with
MR ASHIN H DESAI for Respondent No. 1

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 18/09/96

C.A.V. JUDGEMENT

1. Rule. Mr.N.D.Nanavaty appears and waives service of rule on behalf of respondent. With the consent of learned advocates appearing for the parties matter is finally heard and decided. At the request of parties it was treated as part-heard before this court.

2. The petitioner-Gujarat Heavy Chemicals Ltd is aggrieved by the order passed by the 2nd Joint Civil Judge (SD), Junagadh below Exh.35, dated December 11, 1995. It has therefore moved this court under section 115 of C.P.Code assailing the order of the civil court. In order to resolve the dispute and answer the contentions raised few relevant facts are stated herein

(i) On 25.11.1985 a contract was entered into between the petitioner and respondent-M/s La-V-Jay & Associates whereby earth work for salt pans at Chikhli the respondent was awarded the contract. The agreement contained an arbitration clause for adjudication of disputes and differences between the parties. Disputes and differences arose between the parties with regard to execution work under the contract and the contractor therefore filed Civil Suit No.182/88 before the Civil Judge (SD), Junagadh for appointment of an arbitrator from amongst the persons named and to make reference of disputes and differences between the parties to the arbitrator. The contractor-respondent suggested the name of one Brig.D.P.Kathuria as the sole arbitrator. The trial court thereupon proceeded to appoint said person as the sole arbitrator. The petitioner being aggrieved thereby preferred CRA No.619/89 and in such proceedings the parties agreed to the appointment of two arbitrators for resolving the disputes and differences between the parties. The petitioner-Co.suggested the name of Hon'ble Mr.Justice N.H.Bhatt (Retired judge of this court) and the respondent-contractor suggested the name of Brig.D.P.Kathuria and accordingly both the aforesaid persons were appointed as arbitrators. Accordingly, the disputes and differences between the parties came to be referred to aforesaid two arbitrators. Without entering upon the reference and on their first sitting held on 5.4.90 they appointed Hon'ble Mr.Justice J.M.Sheth (Retd judge of this court) as umpire in case of differences of opinion between the two parties.

(ii) The parties led oral as well as documentary evidence before the arbitrators and submitted written arguments. However, the two arbitrators did not agree and gave their separate awards. The arbitrator appointed by the petitioner, Hon'ble Mr.N.H.Bhatt, gave his detailed award on 23.11.1993 rejecting the claims of respondent-claimant and also rejected the counter claim of the petitioner-Co. On the other hand Brig.D.P.Kathuria rendered his award on 25.11.1993 and he awarded Rs.47,32,206.27ps with interest thereon at 18% p.a. from 29.8.87 till the date of the award and further

interest @ 18% p.a. on the principal amount awarded till the date of payment or decree.

(iii) When Hon'ble Mr.Justice J.M.Sheth was approached to enter upon the reference as umpire he expressed his inability to do so on the ground of his illhealth.

(iv) Thereupon the present petitioner filed application at Exh.35 in the aforesaid civil suit for appointment of umpire and in the said application it was prayed that a retired judge be appointed as umpire and suggested following names as umpire:

(i) Hon'ble Mr.B.J.Diwan, former Chief Justice of Gujarat High Court.

(ii) Hon'ble Mr.Justice Chandrachud (Ex-Chief Justice of India),

(iii) Hon'ble Mr.Justice E.S.Venkataramiah
(Ex-Chief Justice of India)

Even the appropriate consent of Hon'ble Mr.Justice B.J.Diwan, former Chief Justice of this court to act as umpire was obtained and that was filed in the court.

(v) The respondent-Contractor filed reply to such application and objected to the appointment of any retired judge as umpire and suggested three names for appointment as umpire. The said names are as under:

(i) Mr.V.B.Patel, retired Chairman, Central Water Commission and Ex-officio Secretary to Govt. of India,

(ii) Mr.P.J.Mehta, Retd.Secretary, P.W.D., Govt.of Gujarat,

(iii) Mr.A.T.Joshi, Retd.Special Secretary, P.W.D. Govt.of Gujarat

(vi) The petitioner filed rejoinder to said application filed by the contractor.

(vii) The trial court thereupon after hearing the submissions of the learned advocates for parties proceeded to decide Exh.35 and found that since the nature of dispute or differences between the parties related to highly technical matter, a technical personnel having sufficient knowledge of the subject should be

appointed as umpire. The submission that retired judge of the High Court or any person of legal profession should be appointed as umpire made by the petitioner-company mainly on the ground i.e. earlier the two arbitrators have after entering upon the reference appointed Hon'ble Mr. Justice J.M. Sheth (Retd. Judge of this court). It was in the fitness of things to appoint retired judicial officer is rejected by the trial court on the ground that the judicial officer or retired judge of the High Court or Supreme Court was ill-suited for the purpose of deciding the nature of such dispute or differences necessitating technical knowledge and expertise of technical matters and that was the main ground relied upon by the trial court for appointment of umpire a person other than person from legal profession. He therefore, upheld the contention of the contractor and appointed Mr. V.B. Patel, Chairman, Central Water Commission and ex-officio Secretary to Govt. of India as a fit person to act as umpire. To buttress his order he relied upon the decisions of two High Courts, one being J & K High Court which is reported in AIR 1972 J&K 63 where the view was taken that dispute between the parties which relates to a technical matter can be solved and settled by a qualified Engineer or person having such technical nature. It is against aforesaid judgment and order of 2nd Jt. Civil Judge (SD) the present CRA is filed.

3. Mr. J.M. Thakore, Ld. AG appearing for M/s Trivedi & Gupta has relied upon the following for the purpose of bringing home his submission that judicial officer ought to have been appointed as umpire in the facts and circumstances:

(i) No term or condition of the contract, directly or indirectly, prohibit or discourage the appointment of judicial officer as arbitrator/umpire.

(ii) In the present case the arbitrators had, by order, dated 5.4.90, before commencing arbitration proceedings, appointed Mr. Justice J.M. Sheth (Retd) to be umpire in case there is difference of opinion between the two arbitrators. He was one of the eminent judges of the Gujarat High Court and his appointment as umpire was accepted without demur by the contractor. That it could also suggest that the appointment of any judicial officer as umpire was not found to be objectionable by the contractor. Attention of the court is drawn to the minutes of proceedings on 5.4.90 wherein at Cl.7 the arbitrators have noted as under:

"As per clause 2 of the First Schedule of

Indian Arbitration Act, 1940, the two Arbitrators are required to name an umpire in case unfortunate difference of opinion arises. Retd. Justice J.M. Sheth will be the Umpire as fixed by the 2 arbitrators with the concurrence of both the sides"

(iii) It was therefore abundantly clear that there was concurrence in the appointment of retired judge of Gujarat High Court as umpire and nobody had shown any reservation or objection to any judicial officer being appointed as umpire. That necessity for appointment of umpire arises when sole arbitrator neglects or refuses to give award or when two arbitrators differ in their opinion while giving award and thirdly when the named umpire either neglects or is unable to enter the reference. The parties could themselves appoint umpire by common consent or leave the appointment to arbitrators themselves or in some cases the arbitration agreement may be silent about the appointment of umpire. In either of the last two cases the arbitrators have to appoint the umpire within one month from the last date of their own respective appointments. In a given case even the parties may reserve the right to themselves to appoint an umpire.

4. Now, in case where umpire is appointed by the arbitrators and he is incapable of acting as umpire because of his illhealth, the power is given to the court to appoint umpire under section 8(2) of the Indian Arbitration Act, 1940. The power and the jurisdiction of the court to appoint umpire in arbitration proceedings is unfettered and uncontrolled except that the court shall have to decide the application of any party under section 8(2) and it has no power to act suo moto. In the present case undoubtedly the civil court was moved for appointment of umpire by application at Exh.35 and therefore under section 8(2) the court is conferred with the discretion to appoint umpire. The discretion to be exercised by the court is undoubtedly judicial discretion and it shall have to act justly and fairly after taking into consideration the relevant factors for appointment of an umpire. Who shall be more suited to work as umpire is a decision which is to be taken by the court in exercise of its judicial discretion. It is undoubtedly true that the person appointed as umpire must be honest, impartial and one whose integrity can not be doubted. Secondly, he must be a person who is having essential

knowledge of the subject that which he is to deal and has sufficient experience in that branch of science. Thirdly, in matters involving highly technical points appointment of a person conversant with such discipline and having technical knowledge of the subject is preferable. This would not tantamount to saying that retired judicial officer is illsuited or he can not act as umpire because he is lacking technical expertise. The appointment of umpire therefore should be of a person who as such enjoy confidence and faith of both the parties and simply because arbitrators appointed a retired judge of the High Court as umpire in case of differences of opinion between them, a court of competent jurisdiction can not be prevented from exercising its judicial discretion in a judicial manner provided the court has acted justly, fairly and equitably. In the present case, the trial court has found that since the disputes or differences of opinion between the parties centre round the technical subject, the appointment of a technical person would be just and proper. Such exercise of judicial discretion can not be said to be arbitrary, capricious, whimsical or based on unsustainable ground. The court has while passing the impugned order appointed one of the technical persons suggested by the contractor. His appointment is assailed on the ground that he is a person unfit to act as umpire or that he is partial or is not likely to act justly, fairly and honestly. The only ground advanced by the Ld.AG appearing for the petitioners is that a retired judicial officer would be better suited to act as an umpire because ultimately he was required to see as to whether breach of contract was committed or not and if so by whom the breach was committed. It is not that simple. An attempt was made at the instance of this court to agree to some common name of a person who is otherwise competent to act as umpire. The contractor, however, has a very strong objection to the appointment of any retired judge of the High Court or the Supreme Court as umpire on number of counts and he insisted that a person to be appointed should be one possessing technical expertise and he was ready and willing to exchange the names of such persons with the other side and in fact for reaching an agreement on some common name, the hearing of this CRA was postponed, from time to time. Unfortunately, the parties could not reach any consensus and the matter is therefore required to be decided by this court. To the appointment of any technical person having expertise in the subject there is no inherent objection from both the parties except the fact that he should be acceptable to the petitioner-Co also. The appointment of any retired judge of the High Court or of the honourable Supreme Court as

umpire, on the other hand, was strongly objected by the contractor for the reasons which were submitted initially at the stage of admission. It was suggested that the retired judges of Supreme Court/High Court charge exorbitant fees at the rate of per sitting per day which at times is excessive and unbearable for the party/parties.

5. Secondly, such umpire fixes the conference at five star hotels in the town where they are residing or in any other big cities which has no connection whatsoever to the site of contract. The charges incurred for their lodging, boarding and hospitality at five star hotels are once again very expensive and very often fees given to them substantially slice down the amount awarded by fees awarded.

6. Thirdly, such umpires act at their leisure and convenience and very often they accept number of arbitrations, they adjourn the hearings and result of disputes is thus prolonging beyond reasonable period.

7. Fourthly, without any knowledge or expertise in the technical subject, such umpire very often fail to appreciate the technical point involved.

8. Fear or apprehension shown by the contractor at the initial stage of admission hearing of this revision application can not be said to be illfounded, and there is some substance in what they have submitted. Disagreement therefore to the appointment of any retired judicial officer and insistence for appointment of technical person can not be said to be illegal, unjust or without substance.

9. In view of the above discussion, I do not find that the civil court has acted without jurisdiction and/or in excess of jurisdiction. It also can not be said that it has committed material irregularity in exercise of its powers. Order which the civil court can pass is discretionary order to be passed on just, fair and equitable considerations and not based on any fanciful or whimsical reasons. It also can not be said that in exercise of such jurisdiction the civil court has acted with material irregularity. The fact that initially two arbitrators appointed another retired judge of High Court to act as umpire is not of much significance as the said umpire has expressed his inability to act as umpire on the ground of illhealth. It would not mean that one of the parties to the arbitration has permanently or for all times to come

agreed or concurred to appointment of retired judicial officer as umpire. In the objections filed by the contractors it is pointed out as to why a technical person should be appointed and as to why he is best suited for the purpose of acting as umpire and it has given a list of names of five such technical persons before this court, two of them being of national status having number of awards and merits to their credit, but the other party is not agreeable to the appointment of a technical person as an umpire. This court therefore does not find any flaw in the reasoning given by the trial court nor can the judgment and order of the trial court be said to be beyond its jurisdiction or one where it has refused to exercise its jurisdiction. It also can not be said that it has acted with material irregularity in exercise of its discretion in view of the express provision of section 115 of CPC. Therefore it would not be permissible for this court to interfere with the otherwise fair and equitable order passed by the civil court and hence this CRA is dismissed and the order passed by the trial court is confirmed. Rule is accordingly discharged. No costs.

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